

REMARKS

Claims 15-18, 20 and 22-40 are pending in the present application. In the Final Office Action mailed September 13, 2007, claims 22-26 and 28-30 have been allowed, and claims 15-18, 20, 27 and 31-40 stand rejected. Claims 20, 22, 27 and 33 have been amended in this response. Reconsideration of the present application as amended and in view of the remarks that follow is respectfully requested.

Applicants thank the examiner for the suggested changes to place the application in condition for allowance. The suggested changes to the allowed claims have been made; however, the rejected claims are believed allowable for the reasons provided below and have not been cancelled pending reconsideration by the examiner.

Claim 27 was objected since it was considered unclear whether the steps recited are replacement steps or additional steps. Claim 27 has been amended as suggested by the examiner to recite "cutting further includes" to address the objection. Withdrawal of the objection to claim 27 is respectfully requested.

Claim 33 was rejected under 35 USC §112, second paragraph for failing to particularly point out and distinctly claim the subject matter applicant regards as the invention. It is noted that the last two lines of claim 33 recite that the second height is greater than the third height. However, these lines were intended to recite that the second height is greater than the first height. This configuration is shown in Figure 5 and discussed at page 10, where height h of first non-cutting portion approximately equals d1 of the implant, height H of the distal, second non-cutting portion 36 approximately equals d2 of the implant, and height d2 is greater than height d1 (page 9, line 5-6) and so height H is greater than height h. The third height of the cutting portion is greater than each of heights h, H as shown in Figure 5. Amended claim 33 meets the requirement of 35 USC §112 and withdrawal of this basis of the rejection of claim 33 is respectfully requested.

Claim 22 has been amended as suggested by the examiner and is allowable as indicated in the Final Office Action. Claims 23-30 depend from claim 22 and are also allowable.

Claim 20 has been amended along the lines suggested by the examiner for claim 22. Accordingly, claim 20 is also allowable as amended, and the proposed amendments are not

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believed to raise new issues for consideration by the examiner. If the rejection of claim 15 is maintained, an indication that claim 20 is allowable if rewritten to expressly include the features of the tool of claim 15 is respectfully requested.

Independent claims 15 and 31 stand rejected under 35 USC §102(b) as being anticipated by EP 0646366 to Steffee. Claim 15 recites, in combination with the other features therein, "wherein said first non-cutting portion, said cutting portion, and said second non-cutting portion have a rotatably selectable alignment to present a generally constant height dimension, to facilitate insertion of the tool between the first and second vertebrae, said cutting portion being rotatable out of said alignment to cut a first opening into the first endplate and a second opening into the second endplate." Claim 31 recites a similar arrangement. Steffee does not disclose that implant 10 is rotatable out of an alignment with small outer diameter portion 110 and extension 136. When implant 10 is rotated with instrument 80, extension 136 also rotates with implant 10 since it is clamped to the side of implant 10 with the other extension 136. Thus, instrument 80 maintains the alignment between extension 136 and implant 10.

Furthermore, implant 10 is not rotatable out of a rotatably selectable alignment with small outer diameter portion 110. Extensions 136 extend from clamp halves 130, and clamp halves 130 include tapered surfaces 132 that engage tapered portion 102 of opening 92 of small outer diameter portion 110 to secure implant 10 between extensions 136. The relative axial positioning between small outer diameter portion 110 and extensions 136 is maintained when implant 10 is rotated since, once implant 110 is engaged to instrument 80, tapered surfaces 132 maintain contact with tapered portion 102 so that the implant 10 remains secured to instrument 80. Since the relative axial positioning of small outer diameter portion 110 and extensions 136 is maintained when instrument 80 rotates implant 10, implant 10 also is not rotatable out of its rotatably selected alignment with extensions 136 and small outer diameter portion 110. Therefore, Steffee does not disclose the elements arranged in the manner recited in claims 15 and 31 and cannot anticipate these claims.

With respect to claims 16-18 and 20 depending from claim 15, they are allowable at least for the reasons claim 15 is allowable. With respect to claims 32-40 depending from claim 31, these claims are allowable at least for the reasons claim 31 is allowable.

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In view of the foregoing amendments and remarks, it is respectfully submitted that the application is in condition for allowance with pending claims 15-18, 20, and 22-40. Reconsideration of the subject application is respectfully requested. Timely action towards a Notice of Allowability is hereby solicited. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the subject application.

Respectfully submitted,

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